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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JUL 02 2013

SEAN F. McAVOY, CLERK
SPOKANE, WASHINGTON
DEPUTY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

THERMAPURE, INC.,

Plaintiff,

v.

JUST RIGHT CLEANING &
CONSTRUCTION, INC.,

Defendant.

No. CV-11-0431-RHW

**ORDER GRANTING DEFENDANT'S
MOTION FOR RECONSIDERATION**

Before the Court is Defendant's Motion for Reconsideration, ECF No. 76. Plaintiff has responded, ECF No. 82, to which Defendant has replied. ECF No. 83. Defendant moves the Court to reconsider the November 7, 2012, Order, ECF No. 75, which denied Defendant's Motion for Partial Summary Judgment, ECF No. 15. The instant Motion was noted for hearing on December 14, 2012, without oral argument. The Court deferred ruling on the Motion, in anticipation of a claim construction hearing, which included additional briefing on the construction of the disputed claim terms at issue, "predetermined temperature" and "high temperature / heated gas." *See* ECF Nos. 84-90.

The Court's focus is now whether Claim No. 6 of the '812 Patent includes a "targeted organism" construction. This issue was not addressed by the Court's previous order, and is now dispositive of Plaintiff's sole infringement claim of the '812 Patent. The Court has reviewed all documents in support of, and in

**ORDER GRANTING DEFENDANT'S
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1 opposition to the Motion, including the relevant claim construction materials. For
2 the reasons set forth below, the Court **grants** the Motion.

3 **I. PROCEDURAL HISTORY**

4 On November 18, 2011, Plaintiff ThermaPure, Inc., (“ThermaPure”), filed a
5 complaint alleging that Defendant Just Right Cleaning & Construction, Inc. (“Just
6 Right”) infringes U.S. Patent No. 6,327,812 (the “‘812 Patent”). ECF No. 1.
7 Thereafter, Defendant filed counterclaims seeking declaratory judgments of non-
8 infringement and invalidity. ECF No. 9.

9 On February 21, 2012, Defendant filed a motion for partial summary
10 judgment of non-infringement, as to Claim No. 6 of the ‘812 Patent. ECF No. 15.
11 On May 15, 2012, Plaintiff responded, ECF No. 35, and Defendant replied on May
12 29, 2012. ECF No. 45.

13 The Court held a telephonic hearing on July 19, 2012. At the hearing, the
14 Court permitted the parties to file additional briefing on the issue of Claim No. 6’s
15 “predetermined temperature” limitation. On August 10, 2012, Plaintiff submitted
16 supplemental briefing in opposition to Defendant’s motion for partial summary
17 judgment, ECF No. 58. Defendant submitted its supplemental response on August
18 17, 2012. ECF No. 67.

19 On August 16, 2012, Plaintiff filed a motion to amend the asserted claims
20 and infringement contentions, to include Claim Nos. 4 and 8 of the ‘812 Patent.
21 ECF No. 63. Defendant responded in opposition on August 30, 2012, ECF No. 70,
22 to which Plaintiff replied on September 6, 2012. ECF No. 71.

23 The Court held another telephonic hearing in response to these additional
24 issues on October 15, 2012. By Order dated November 7, 2012, the Court denied
25 both Defendant’s motion for partial summary judgment and Plaintiff’s motion to
26 amend asserted infringement contentions (hereafter “MSJ Order”). ECF No. 75.
27 On November 14, 2012, Defendant moved for reconsideration. ECF No. 76.

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1 Plaintiff responded in opposition on December 11, 2012. Defendant replied on the
2 same date. ECF No. 83.

3 On January 1, 2013, the parties then filed their Opening Claim Construction
4 Briefs, ECF Nos. 84 and 86, and submitted Responsive Claim Construction Briefs
5 on January 18, 2013. ECF Nos. 88 and 89. On February 26, 2013, the Court struck
6 the scheduled claim construction hearing,¹ and determined such a hearing was not
7 necessary in order to resolve Defendant's Motion for Reconsideration and
8 construction of the disputed claim terms noted above. *See* ECF No. 92.

9 **II. RECONSIDERATION STANDARD²**

10 Reconsideration is an "extraordinary remedy, to be used sparingly in the
11 interests of finality and conservation of judicial resources." *Kona Enterprises, Inc.*
12 *v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (internal citation omitted).
13 However, FED. R. CIV. P. 54(b) authorizes the court to modify an interlocutory
14 order, such as the Court's November 7, 2012, MSJ Order, "which adjudicates
15 fewer than all of the claims . . . at any time before entry of judgment adjudicating
16 all of the claims." *See also Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d
17 1119, 1124 (9th Cir. 2005) (The Ninth Circuit has "long recognized the well-
18 established rule that a district court judge always has the power to modify or to
19 overturn an interlocutory order or decision while it remains interlocutory.")
20 (internal citation omitted). In addition, where reconsideration of a non-final order

21 ¹ *See Ballard Med. Prods. v. Allegiance Healthcare Corp.*, 268 F.3d 1352, 1358
22 (Fed. Cir. 2001) (noting "Markman does not require a district court to follow any
23 particular procedure in conducting claim construction[,] . . . if the district court
24 considers one issue to be dispositive, the court may cut to the heart of the matter
and need not exhaustively discuss all the other issues presented by the parties.")

25 ² The parties are well aware of the relevant legal standards regarding summary
26 judgment, claim construction, and patent infringement, *See* MSJ Order, ECF No.
27 75 at 6-8, 10-11.

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1 is sought, the court has inherent jurisdiction to reconsider, rescind, or modify an
2 interlocutory order for cause seen by it to be sufficient. *City of Los Angeles v.*
3 *Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001).

4 **III. CONCURRENT AND RELATED LITIGATION**

5 The aforementioned inquiry requires the Court to evaluate the construction
6 of the disputed claim terms not contemplated by the prior MSJ Order. The issue is
7 whether Defendant's Water Out sanitization method infringes Claim No. 6 of the
8 '812 Patent. Accordingly, the Court must decide whether to adopt Defendant's
9 proposed construction of the disputed claim terms "predetermined temperature"
10 and "high temperature / heated gas." As an initial matter, the Court notes that the
11 "targeted organism" limitation advocated by Defendant was previously adopted by
12 two other district courts in related and concurrent litigation with Plaintiff
13 ThermaPure. Thus, before turning to the merits of Defendant's motion, the Court
14 will briefly summarize the prior courts' construction of those terms, including its
15 own.

16 **A. Northern District of Illinois**

17 During the pendency of Defendant's motion for partial summary judgment
18 before this Court, the Hon. Joan H. Lefkow, U.S. District Court for the Northern
19 District of Illinois,³ entered a claim construction order on July 3, 2012. *See* J. Ard
20 Decl., Ex. A, ECF No. 69 at 5. After holding a *Markman* hearing and construing
21 the '812 Patent, Judge Lefkow interpreted "predetermined temperature" and "high
22 temperature gas / heated gas," (claim terms present in Claims 4, 6, and 8 of the
23 '812 Patent) to include a "targeted organisms" construction. *Id.*:

24 ///

25 ///

27 ³ *See ThermaPure, Inc. v. Temp-Air, Inc., et. al.*, No. 10-CV-4724-JHL (N.D. Ill.).

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Claim Term	Construction
<p>“Means for heating an environmentally acceptable gas to a <u>predetermined temperature</u> that is lethal to predetermined organisms”; “heating a gas to a <u>predetermined temperature</u>”; “a heater coupled to said gas source to heat said gas to a <u>predetermined temperature</u> . . . ”;</p> <p>“preparing said enclosed structure for exposure to a <u>high temperature gas</u> by removing or protecting all heat sensitive items” (cls. 4, 6, 8)</p>	<p>a temperature selected in advance that is sufficient to kill substantially all of the <i>targeted organisms</i></p> <p>gas that has been heated to a temperature sufficient to promptly kill <i>targeted organisms</i></p>

Id. (emphasis added). In that case, Judge Lefkow agreed with Plaintiff ThermaPure’s construction of “predetermined temperature” and refused to accept defendants’ construction that required reading “certain minimum temperatures” in the claims. *See* Def.’s Opening Claim Construction Brief, ECFR No. 84 at 12. Defendant Just Right argues the construction of “predetermined temperature,” which included a “targeted organism” limitation, as advocated by ThermaPure in the Northern District of Illinois, should apply in this case.

As Judge Lefkow reasoned, Claims Four, Six, and Eight of the ‘812 Patent all required that an infringer select and target organisms to destroy:

Because the claim and specification refer to temperature relative to that required to kill, however, the measure of temperature must be sufficient to kill almost all targeted organisms (implicitly promptly) by using the method claimed. Otherwise, a practitioner of the invention would have no guidance as to temperature required.

Id. This ruling applied across Claim Nos. 4, 6, and 8, despite the fact that Claim Six does not include language explicitly referencing killing or removing “targeted organisms.” *See* Claim No. 6 of ‘812 Patent, Ex. 1, ECF No. 1 at 13.

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1 The Court also notes that Plaintiff's parallel suit before Judge Lefkow was
2 recently dismissed with prejudice, due to a confidential settlement. *See*
3 Defendant's Notice of Activity in Related Proceedings, ECF No. 97.

4 **B. Eastern District of Washington**

5 On November 7, 2012, this Court entered an order denying Defendant's
6 motion for partial summary judgment, *inter alia*. MSJ Order, ECF No. 75.
7 Defendant moved for partial summary judgment on asserted Claim No. 6 and
8 argued non-infringement of the '812 Patent, as it did not perform every element of
9 Claim No. 6. The Court then addressed each limitation of Claim Six⁴ allegedly not
10 practiced by Defendant: (1) use of "a *plurality* of temperature indicating probes;"
11 (2) placement of any temperature indicating probes at "*predetermined locations*"
12 within said enclosed structure;" and (3) raising the "temperature within said
13 enclosed structure to a *predetermined temperature*." *Id.* at 8 (emphasis added).

14 Thus, pursuant to the parties' briefing and oral argument, the Court limited
15 its inquiry to the location of "predetermined temperature" and not whether
16 Defendant "targeted organisms." This was also the issue addressed by the parties in
17 their supplemental briefing on construction of the claim term "predetermined
18 temperature." See ECF Nos. 59, 59-1, 61, 61-1, 68, 69. Specifically, the Court was
19 tasked with determining whether "predetermined temperature" meant the
20 temperature inside the structure where it was monitored, not at the heat source as
21 argued by Defendant. *Id.* at 10. Ultimately, the Court construed "predetermined
22 temperature" in Plaintiff's favor to mean "a temperature selected in advance to be
23 reached inside a structure." MSJ Order, ECF No. 75 at 13. The Court reasoned that

24 ⁴ In the MSJ Order, the Court also denied Plaintiff's motion to amend asserted
25 claims and infringement contentions. Plaintiff sought to include Claims Four and
26 Eight of the '812 Patent. *See* ECF No. 75 at 15-17. Consequently, only the
27 following terms of Claim Six are in dispute: 1) "predetermined temperature," and
2) "high temperature / heated gas." *See* ECF Nos. 84, 86.

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1 “‘predetermined temperature’ refer[red] to the temperature to be reached inside a
2 structure, as that is where a predetermined temperature must be obtained to kill the
3 organism or sanitize the building – which the Court note[d] include[d] mold.” *Id.*

4 The Court then denied Defendant’s motion and ruled that a factual dispute
5 existed as the parties presented conflicting evidence regarding predetermination.
6 *Id.* at 14. The parties did not ask the Court to consider whether Defendant “targeted
7 organisms” or whether Claim No. 6 included such a construction regarding
8 “predetermined temperature.” Also, the Court did not construe the claim term
9 “high temperature / heated gas.”

10 However, a review of the briefing reveals that Defendant also asserted that
11 summary judgment was proper because “Just Right never determines a
12 temperature, or identifies organisms to target with heat.” Memo. in support of
13 Def.’s Motion for Partial Summary Judgment, ECF No. 16 at 12. Defendant then
14 submitted evidence that “Just Right does not identify what organisms are in a
15 structure prior to drying.” B. Justesen Decl., ECF No. 17-1 at ¶ 18. Also, in its
16 supplemental briefing, Defendant reiterated that “Just Right never determines a
17 temperature, or identifies organisms to target with heat[.]”. ECF No. 68 at 3. As
18 discussed below, this important distinction was not addressed by the Court in its
19 prior Order, and is now dispositive as to Plaintiff’s infringement claim

20 **C. Western District of Washington**

21 In a concurrent action, Plaintiff ThermaPure sued another former Water Out
22 Licensee,⁵ Water Out Oregon, in the U.S. District Court for the Western District of
23

24 ⁵ Defendant Just Right was also a Water Out Licensee allegedly performing the
25 same limitations of Claim No. 6 that Plaintiff ThermaPure alleged infringed the
26 ‘812 Patent in the parallel suit against defendant Water Out Oregon. *See* ECF No.
27 75 at 4 n. 2. Also, counsel representing Plaintiff ThermaPure and counsel for both
Defendants Just Right and Water Out Oregon are identical.

28 **ORDER GRANTING DEFENDANT’S
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1 Washington.⁶ On November 13, 2012, Judge Lefkow's construction of
2 "predetermined temperature" was adopted by the Hon. Benjamin H. Settle, *See J.*
3 *Ard Decl.*, Ex. A, ECF No. 77. Citing a recent order by Judge Robert Lasnik, also
4 of the Western District of Washington, Judge Settle agreed "that deference must be
5 afforded to other district court constructions." *Id.* at 7. Judge Settle concluded that
6 Judge Lefkow's order and the relevant construction construing "predetermined
7 temperature" and "high temperature gas" to mean "a temperature selected in
8 advance that is sufficient to kill substantially all of the targeted organisms" and
9 "gas that has been heated to a temperature sufficient to promptly kill targeted
10 organisms" was "thoughtful and well-reasoned." *Id.*

11 Judge Settle also found there was no evidence that defendant Water Out
12 Oregon "identifies organisms to target with heat." *Id.* at 8-9. Judge Settle further
13 concluded that a uniform construction among all courts construing the '812 Patent
14 would thereby resolve ThermaPure's infringement claim. *Id.* Judge Settle granted
15 defendant Water Out Oregon's motion for partial summary judgment. *Id.* at 9.
16 Furthermore, aside from the arguments presented to this Court in regard to the
17 location of monitoring the gas temperature, the issues on defendant Water Out
18 Oregon's motion for partial summary judgment addressed by Judge Settle were
19 identical to those presented to this Court.

20 Judge Settle also denied Plaintiff's motion for reconsideration on December
21 3, 2012. *See* No. C-11-5958-BHS (W.D. Wash.), Dkt. 56. Significantly, Judge
22 Settle found that Plaintiff ThermaPure's only evidence⁷ consisted of defendant
23

24
25 ⁶ *See ThermaPure, Inc. v. Water Out Oregon, et. al.*, No. C11-5958-BHS (W.D.
26 Wash.).

27 ⁷ In the case at bar, Plaintiff ThermaPure submits the declaration of Just Right's
28 former employee Seth Justesen as the only evidence that Defendant "targets
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1 Water Out Oregon's ex-employee's declaration that defendant "targeted organisms
2 such as mold and other bacteria." *Id.* at 3. Judge Settle ruled that "evidence does
3 not create a question of fact that [defendant] predetermined temperature of the gas
4 to kill that particular organism because, at most, it shows that [defendant] only
5 treated structures that contained particular organisms." *Id.* Judge Settle also
6 reaffirmed adopting Judge Lefkow's construction of the disputed claim terms:

7 In this case, the Court adopted the construction that addressed the
8 particular issue presented. [Defendant] argued that "claims [of the
9 '812 patent] all require that a temperature be selected in advance:
10 either a temperature predetermined directly, or determined as the
11 temperature lethal to predetermined organisms." Dkt. 17 at 11. Judge
12 Lefkow concluded that the claim language should be construed to
13 require correlation between the gas temperature and a targeted
14 organism, "[o]therwise, a practitioner of the invention would have no
15 guidance as to temperature required." Dkt. 48, Exh. A at 3. The Court
16 considered Judge Lefkow's order, found it to be well reasoned and
17 persuasive as to the particular issue presented in this case, and adopted
18 Judge Lefkow's construction. In fact, even Judge Whaley concluded
19 that Judge Lefkow's construction of predetermined temperature
20 "applied across Claims 4, 6, and 8 of the '812 Patent." Dkt. 53, Exh. 2
21 at 5, ll. 9-10.

22 *Id.* at 5.

23 Finally, the Court notes the remaining invalidity counterclaim asserted by
24 defendant Water Out Oregon, identical to that asserted by Just Right in the instant
25 case, was transferred by joint stipulation of the parties to the Central District of
26 California.⁸ Dkt. 83.

27 organisms," who declared that Just Right used Water Out equipment to sanitize
28 structures containing mold and sewage. S. Justesen Decl., ECF No. 41 at ¶¶ 3, 5.

29 ⁸ Defendant Water Out Oregon is a member of the Restoration Industry
30 Association, who has since filed suit in the U.S. District Court for the Central
31 District of California. *See Restoration Industry Association Inc. v. ThermaPure,*
32 *Inc.*, No. CV-13-3169-JVS-RZ (C.D. Cal.). With the exception of local counsel,

**33 ORDER GRANTING DEFENDANT'S
34 MOTION FOR RECONSIDERATION * 9**

IV. DISCUSSION

A. Defendant's Motion

3 Defendant seeks reconsideration of the Court’s prior Order denying Just
4 Right’s motion for partial summary judgment. Specifically, Defendant argues that
5 the claim term “predetermined temperature” must be construed as “a temperature
6 selected in advance [to be reached within the structure] *that is sufficient to kill*
7 *substantially all of the targeted organisms.*” ECF Nos. 76, 74-1 (emphasis added to
8 disputed language). As to “high temperature / heated gas,” Defendant proposes the
9 Court adopt the construction of “gas that has been heated to a temperature
10 sufficient to *promptly kill targeted organisms.*” ECF No. 88 at 8.

11 Defendant argues that in the interests of judicial economy and efficiency,
12 this Court should adopt the claim constructions outlined above, and already
13 adopted by two prior district courts. ECF No. 76 at 2. Defendant reasons that if the
14 Court agrees to such a construction, Plaintiff can produce no evidence to prove that
15 Just Right “targets organisms.” *Id.* As such, resolution of this issue in Defendant’s
16 favor would resolve Plaintiff’s sole infringement claim as to the ‘812 Patent, and
17 partial summary judgment in favor of Defendant would be proper. *Id.*

18 First, Plaintiff responds that Claim Six does not include a “predetermined
19 organism” limitation, and it would be “incorrect as a matter of law to read into
20 Claim Six a limitation expressly included in other claims of the patent.” ECF No.
21 82 at 1. Plaintiff argues the Court correctly construed “predetermined
22 temperature,” having been fully apprised of Judge Lefkow’s prior construction of
23 that term as applied to Claims 4, 6, and 8 of the ‘812 Patent. *Id.* at 2. Plaintiff
24 argues that reading a “predetermined organisms” limitation into Claim Six violates
25 the doctrine of claim differentiation. *See, e.g., Envtl. Designs Ltd. v. Union Oil Co.*

26 counsel for Plaintiff and Defendant in that case are also identical to the instant
27 case.

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1 of Cal., 713 F.2d 693, 699 (Fed. Cir. 1983) (noting “[i]t is improper for courts to
2 read into an independent claim a limitation explicitly set forth in another claim”).

3 Second, Plaintiff contends that if the Court accepts Defendant’s “targeted
4 organism” limitation, “ThermaPure has presented evidence sufficient to create a
5 triable issue of fact.” ECF No. 82 at 5. Plaintiff submits the Declaration of Seth
6 Justesen who stated that Defendant treated structures with Water Out equipment
7 “that involve contaminants such as mold and sewage.” S. Justesen Decl., ECF No.
8 41 at ¶¶ 3, 5. Plaintiff suggests the proper construction of “predetermined
9 temperature” should mean “a gas heated to a temperature that is sufficient to *kill*
10 *organisms in a structure, e.g., insects, bacteria, dust mites, silver fish, fungi or*
11 *toxic molds.*” ECF No. 86 at 3. ThermaPure also proposes “heating a gas to a
12 predetermined temperature” does not require any special construction, as the Court
13 already defined “predetermined temperature” in its prior MSJ Order. ECF No. 86
14 at 6. Consequently, the phrase “heating a gas” should be given its ordinary
15 meaning. *Id.*

16 **1. Claim Construction**

17 As the parties are aware, the Court construes the scope and meaning of
18 disputed patent claims as a matter of law. *Markman v. Westview Instruments Inc.*,
19 517 U.S. 370, 388–90 (1996). First, the Court disagrees with Plaintiff the “targeted
20 organism” limitation advocated by Defendant was contemplated in its prior Order.
21 As set forth above, the Court focused only on location of the “predetermined
22 temperature.” In fact, the issue confronted by Judge Lefkow in her *Markman*
23 order, as adopted by Judge Settle in his order granting defendant’s motion for
24 partial summary judgment, of how to select and predetermine the temperature was
25 never resolved by this Court. Second, as pointed out by Judge Settle, *Markman*
26 deference in this case is appropriate:

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28 **ORDER GRANTING DEFENDANT’S
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1 In *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 390 (1996),
2 the Supreme Court allocated all issues related to claim construction to
3 the courts, in part as a means of promoting national uniformity in the
4 treatment of a given patent. The Court recognized that only a Federal
5 Circuit construction of a term in the context of a particular patent
6 would achieve the desired result, but it apparently intended that other
7 federal courts would afford some sort of deference to other lower
8 court decisions in the interim. *Markman*, 517 U.S. at 391 (the doctrine
9 of stare decisis “will promote (though it will not guarantee)
10 intrajurisdictional certainty . . . on those questions not yet subject to
11 interjurisdictional uniformity under the authority of the single appeals
12 court.”).

13 J. Ard Decl., Ex. A, ECF No. 77 at 7 (citing Order Construing Claims in *Avocent*
14 *Redmond Corp. v. RoseElectronics et al.*, No. C-06-1711-RSL (W.D. Wash., Feb.
15 6. 2012); *see also Finisar Corp. v. DirecTV Grp., Inc.*, 523 F.3d 1323, 1329 (Fed.
16 Cir. 2008)

17 Thus, the Court agrees with Defendant and finds the prior claim
18 constructions of Judges Lefkow and Judge Settle shall apply in this case.
19 Moreover, the Court finds the opinions of Judges Lefkow and Settle in regard to
20 the disputed claim terms in this case, “well-reasoned and persuasive,” and adopts
21 them *in toto*. As such, “predetermined temperature” shall be construed to mean “a
22 temperature selected in advance [to be reached within the structure] that is
23 sufficient to kill substantially all of the targeted organisms.” Likewise, “high
24 temperature / heated gas” shall mean a “gas that has been heated to a temperature
25 sufficient to promptly kill targeted organisms.”

26 **2. Infringement**

27 Direct infringement of a method claim requires the alleged infringer to
28 perform *each and every* step of the claim. *BMC Resources, Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1378–79 (Fed. Cir. 2007) (emphasis added). If the method
29 does not meet even one of a claim’s limitations, there is no infringement.
30 *MicroStrategy Inc. v. Business Objects, S.A.*, 429 F.3d 1344, 1352 (Fed. Cir. 2005).

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1 The Federal Circuit has held that summary judgment is appropriate and “that
2 nothing more is required than the filing of a summary judgment motion stating that
3 the patentee had no evidence of infringement and pointing to the specific ways in
4 which accused systems did not meet the claim limitations.” *Exigent Tech., Inc. v.*
5 *Atrana Solutions, Inc.*, 442 F.3d 1301, 1308 (Fed. Cir. 2006).

6 Having determined the meaning of the disputed claim term, the Court now
7 turns to the issue of whether Defendant’s sanitization method infringes on Claim
8 No. 6 of the ‘812 patent. The Court finds that it does not.

9 Plaintiff’s only evidence consists of the testimony of Just Right’s former
10 employee Seth Justesen:

11 3. Structural drying jobs are also called “water loss jobs.” There are
12 three categories of water loss jobs. Category 1 involves damage
13 caused by clean water. Categories 2 and 3 involve contaminants such
as mold and sewage.

14 5. At Just Right I used Water Out equipment to perform all three
15 categories of water loss jobs. Water Out equipment was virtually the
16 sole equipment used by Just Right to perform water loss jobs; the
17 exception being very small water loss jobs where only dehumidifiers
and air movers were required.

18 S. Justesen Decl., ECF No. 41 at ¶¶ 3, 5.

19 Here, as reasoned by Judge Settle, Plaintiff’s evidence shows at a minimum
20 Just Right merely treated structures that contained mold. However, viewing this
21 evidence in the light most favorable to Plaintiff, “there is no evidence that creates a
22 question of fact as to the correlation between [a predetermined] temperature and a
23 targeted organism.” *See* No. C-11-5958-BHS (W.D. Wash.), Dkt. 56. Thus,
24 because there is no evidence that Defendant Just Right “identifies organisms to
25 target with heat” there is no infringement of Claim No. 6. *See also Voice Techs.*
26 *Group, Inc. v. VMC Sys., Inc.*, 164 F.3d 605, 612 (Fed. Cir. 1999) (“Upon
27 construction of the claims, summary judgment may follow when it is shown that

28 **ORDER GRANTING DEFENDANT’S
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1 the infringement issue can be reasonably decided only in favor of the movant");
2 *Vivid Techs., Inc. v. Am. Science & Eng'g, Inc.*, 200 F.3d 795, 806 (Fed. Cir. 1999)
3 (same). In sum, Defendant's motion for reconsideration should be granted and
4 summary judgment is appropriate as Plaintiff has failed to show that a material fact
5 exists for trial on each element of its infringement claim.

6 Accordingly, **IT IS HEREBY ORDERED:**

7 1. Defendant's Motion for Reconsideration, ECF No. 76, is **GRANTED**.

8 2. The Court's prior Order dated November 7, 2012, ECF No. 75, is

9 **VACATED** as to the denial of Defendant's Motion for Partial Summary
10 Judgment.

11 3. As such, and for the reasons enumerated above, Defendant's Motion for
12 Partial Summary Judgment, ECF No. 15, is **GRANTED**.

13 4. The parties are ordered to **SHOW CAUSE** by **July 17, 2013**, why
14 Defendant's remaining invalidity counterclaim should not be transferred to the
15 Central District of California in related actions: *Restoration Industry Association*
16 *Inc. v. ThermaPure, Inc.*, No. CV-13-3169-JVS-RZ (C.D. Cal.); and *ThermaPure,*
17 *Inc. v. Water Out Oregon et al.*, No. CV-13-4052-JVS-RZ (C.D. Cal.).

18 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
19 Order and forward copies to counsel.

20 **DATED** this 2nd day of July, 2013.

22 *s/Robert H. Whaley*
23 ROBERT H. WHALEY
24 Senior United States District Judge

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28 **ORDER GRANTING DEFENDANT'S**
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